

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR APPELLANT

985

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,004

EUGENE WILLIAMS,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee,

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals
for the District of Columbia Circuit

FILED SEP 4 1968

Nathan J. Paulson
CLERK

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Attorney for Appellant
(Appointed by this Court)

Statement of Question Presented

Whether appellant was entitled to the "missing witness" instruction where, his sole defense being his explanation that he obtained possession of the stolen vehicle from the "missing witness," appellee failed to have the "missing witness" testify at the trial although he had been taken in custody by police at the same time appellant was arrested.

This case has never been before the United States Court of Appeals for the District of Columbia Circuit.

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CITATIONSCases:

Bollenbach v. United States, 326 U.S. 607,
66 S.Ct. 402, 90 L.Ed. 350

Graves v. United States, 150 U.S. 118,
14 S.Ct. 40, 37 L.Ed. 1021

Pennewell v. United States, 122 U.S. App. D.C.,
353 F.2d 870

*United States v. Jackson, 257 F.2d 41
(3 Cir., 1958)

Miscellaneous:

1 Wigmore, Evidence, sec. 288, (3d. Ed. 1940, Supp. 1957)

2 Wigmore, Evidence, 169-170 (3d. Ed. 1940)

* Case chiefly relied upon.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,004

EUGENE WILLIAMS,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
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BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from conviction for violation under Title 22, Section 2204, of the District of Columbia Code and violation under Title 18, Section 2312, of the United States Code. The United States District Court had jurisdiction to try appellant. This Court has jurisdiction of this appeal under Title 28, Section 1291, of the United States Code.

STATEMENT OF THE CASE

Appellant was indicted by a Grand Jury in the United States District Court for the District of Columbia on September 19, 1966, in Criminal No. 1105-66 for violation of 22 D.C. Code 2204 (Unauthorized Use of Vehicle) and violation of 18 U.S.C. 2312 (Interstate Transportation of Stolen Motor Vehicle). The indictment charged in First Count that appellant on July 21, 1966, within the District of Columbia took the automobile of John A. Hogue and operated it without the consent of the owner. The indictment charged in Second Count that appellant on July 21, 1966 transported said automobile from the District of Columbia to Maryland.

Appellant pleaded not guilty to said indictment on September 30, 1966. On October 7, 1966 the District Court appointed counsel to represent appellant. Trial was held and on April 4, 1967 the jury returned its verdict of guilty as indicted. Appellant was sentenced on April 28, 1967 to imprisonment of one to three years on each count to run concurrently. The District Court on April 28, 1967 ordered that the appellant be authorized to proceed on appeal in forma pauperis. This Court on May 22, 1967 appointed present counsel to represent appellant.

At the trial the Government called the owner of the automobile who testified that he had parked it, with keys left in the ignition, on July 21, 1966 at approximately 5:20 p.m., on the street at New York Avenue and Thirteenth

Appellant pleaded not guilty to said indictment on September 30, 1966. On October 7, 1966 the District Court appointed counsel to represent appellant. Trial was held on

Street, N. W.; had returned several hours later to find it missing; had reported the loss to the Police Department; had identified his recovered automobile the next day; had not known appellant and had not given permission to anyone to operate his automobile. (TR. 5-7)

The Government called the officer of the United States Park Police who had recovered the automobile. He testified that while patrolling on the Baltimore-Washington Parkway in Prince George's County, Maryland, on July 21, 1966 at approximately 8:30 p.m. he saw the automobile stopped on the road with appellant seated behind the wheel and two boys as passengers. Appellant told him that the owner of the car was walking ahead. The officer requested another officer to pick up a man walking ahead. This was done and Peyton Gordon Tyler was brought to the scene where appellant identified him as the owner of the car. Appellant was charged with traffic violations and all four persons were taken to the police station. (TR. 33-38)

On cross-examination the officer testified that appellant at the station house told that he had been a passenger in the car driven by Tyler and had moved the car after Tyler had gotten out. (TR. 39) Appellant denied having taken the car. (TR. 42).

The Government called as witnesses the two boys who were in the car with appellant. They were only 13 and 16 years of age. The 16 year old, Lloyd Hall, testified that

they had met appellant, who he had known for five (5) years, on July 21, 1966 at about 5:30 p.m. or 6:00 p.m. at a ball game in Beaver Heights, Maryland. He was alone and had an automobile, with Virginia tags, which he said was his. The 13 year old asked for a ride home and appellant drove the car with both boys as passengers onto the Baltimore-Washington Parkway. They were returning when they saw Tyler, who he had known for five (5) years, and stopped. Steam started coming from the radiator and Tyler removed the cap. Appellant invited Tyler to ride with them; Tyler refused. Appellant drove on, stopped again and the police officer arrived. (TR. 10-13)

The 13 year old, Lamont Gorham, testified he and Lloyd Hall had met appellant who was alone and had an automobile at the ball game at Beaver Heights on July 21, 1966, went as passengers for a ride in the car driven by appellant, met Tyler walking on the Baltimore-Washington Parkway as they were returning, and Tyler refused appellant's invitation to ride with them. (TR. 22-26). The car started smoking and Tyler put water in the radiator. Appellant drove on but stopped when the car resumed smoking and the police officer arrived. (TR. 26)

Appellant called his fiance and his uncle to explain his whereabouts on July 21, 1966. Ione Johnson testified that appellant had visited her at noontime in her apartment in

northwest Washington and left by taxi after about one-half hour. (TR. 44) Luther Gordon testified that his nephew had arrived at his house between 1:00 p.m. and 2:00 p.m. and remained until he left at 5:30 p.m. or 6:00 p.m. for his nearby residence. (TR. 46)

Appellant took the stand and testified that after visiting his fiance and his uncle he returned to his residence and then walked to a nearby high school where he chatted with some teen-agers and then walked on over the District line into Maryland where he met Lloyd Hall and Lamont Gorham. (TR. 48-54) Tyler, who appellant had known for three (3) years came along driving an automobile. Appellant said that they were going to a ball game and Tyler invited them to ride with him. They got in and when Tyler drove onto the Baltimore-Washington Parkway appellant protested that they were not going in the direction of the ball game. (TR. 55, 56) Appellant persuaded Tyler to turn around and on the return trip the car became overheated and was stopped. (TR. 57) Tyler got out and walked away and appellant took the wheel and drove after him. Tyler got in and drove a short distance, stopped, got out and walked away again. (TR. 58) Appellant again took the wheel to park the car and the police officer arrived. (TR. 59)

At the close of trial appellant's counsel requested the Court to instruct the jury that Peyton Gordon Tyler was a witness peculiarly available to the Government and that

therefore the failure of the prosecutor to produce him as a witness would permit the jury to infer that his testimony would have been unfavorable to the Government. The Court denied the request on the ground that the evidence had not shown that Tyler was peculiarly available to the Government. (Statement of Proceedings)

The jury found appellant guilty as charged and appellant appeals from the conviction thereof.

SUMMARY OF POINT

The District Court erred in denying appellant's request for the "missing witness" instruction on the ground that the missing witness was not peculiarly available to the Government.

STATUTES INVOLVED

District of Columbia Code, Title 22, Section 2204.

Unauthorized Use of Vehicle:

"Any person who, without the consent of the owner, shall take, use, operate, or remove, or cause to be taken, used, operated, or removed from a garage, stable, or other building, or from any place or locality on a public or private highway, park, parkway, street, lot, field, inclosure, or space, an automobile or motor vehicle, and operate or drive or cause the same to be operated or driven for his own profit, use, or purpose shall be punished by a fine not exceeding one thousand dollars or imprisonment not exceeding five years, or both such fine and imprisonment."

United States Code, Title 18, Section 2312. Transportation of Stolen Vehicles:

"Whoever transports in interstate or foreign commerce a motor vehicle or aircraft, knowing the same to have been stolen, shall be fined not more than \$5,000 or imprisoned not more than five years, or both."

SUMMARY OF ARGUMENT

The Government knew that appellant had made statements at the time he was found behind the wheel of the automobile, at the time he confronted Tyler, and at the police station house that his presence in the automobile had been by invitation of Tyler, who he considered to be its owner. If found to be true, this would have exonerated him. The Government should have given him the opportunity to cross-examine Tyler. Instead, it relied on the testimony of two minor boys to rebut appellant's sole defense. Tyler no less than the minor boys had been in custody of the police at the time of appellant's arrest. The Government had been able to produce the minor boys and should have been able to produce Tyler. The inference is that it did not choose to do so, despite the issuance of a subpoena on Thursday for a trial on the following Monday.

ARGUMENT

Park policeman Crockett testified that appellant was behind the wheel of the parked automobile when he saw him for the first time on the Baltimore-Washington Parkway. He asked for his driver's license and registration, which appellant did not have. Instead, appellant explained that the owner of the car was walking ahead. (The policeman testified that appellant used the word "brother" but if he did he could have meant "soul brother" as used at TR. 81). The policeman charged him with traffic violations which he did not specify and the nature of which remained unknown throughout the trial.

Tyler was then brought to the scene and appellant identified him as the owner of the car. Later, at the station house, appellant continued to explain that he had been a passenger in the car driven by Tyler.

After questioning, Tyler and the two minor boys were released and appellant held. The purpose of the questioning was not stated nor was the reason for taking the four persons to the station house. Crockett had charged appellant with traffic violations at 8:30 p.m. and had learned of the stolen car at 10:00 p.m. As both Tyler and appellant denied ownership of the car it followed that one of them probably had used it without authority of its owner. The police believed Tyler, after hearing both sides. The jury, however, heard only one side.

The testimony at the trial was clear and consistent that appellant at all times had explained that he had been a passenger in the car driven by Tyler. This made Tyler an important witness to the transaction -- and he was missing from the trial.

The general rule on the "missing witness" is stated in Graves v. United States, 150 U.S. 118, 121, 14 S.Ct. 40, 41, 37 L.Ed. 1021:

"The rule even in criminal cases is that if a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that it does not do it creates the presumption that the testimony, if produced, would be unfavorable."

This is not a case where it could be contended that the witness was equally available to either side. This recognized exception to the general rule ^{1/} cannot be applied in the circumstances of this case. This Court said in Pennewell v. United States, 122 U.S. App. D.C. 332, 333, 353 F.2d. 870, 871:

"In a case like this, where it cannot reasonably be supposed or inferred that the missing witness would have supported the defendant's account, even if true, we do not think there is any legitimate basis for comment on defendant's failure to call the missing witness."

Too, where, as here, it is known that the missing witness had denied to the police appellant's account, there is no legitimate basis for expecting appellant to call him as a witness.

1/ 2 Wigmore, Evidence, 169-170 (3d.Ed. 1940)

Further, Tyler could not have been expected to testify favorably to appellant because to do so could have involved his admission of violation of law. Appellant's only chance of eliciting testimony that would elucidate the transaction and exonerate him would be the opportunity presented for cross-examination. He was deprived of this opportunity by the Government's failure to produce Tyler as a witness.

The Government's opposition to appellant's request for the instruction did not allege that Tyler was equally available to both sides. It could hardly have done so in the face of the law and the facts of this case. Yet, in admitting that Tyler was unavailable to appellant it seeks to establish that he was unavailable also to the Government because it had issued a subpoena on Thursday, March 30 for the trial on Monday, April 3. In United States v. Jackson, 3 Cir. 1958, 257 F.2d 41, 43, the Court said of the missing witness:

"His presence was a natural part of the Government's case and certainly he was not the kind of witness that the defendant could be expected to call."

Tyler was more than a natural part of the Government's case: he was an essential part of the defendant's case. The Government should have made the same effort to produce him as it would have done if he had been essential to its case. It did not do so and its failure deprived appellant of the opportunity of cross-examining Tyler and exonerating himself. He should have been permitted to bring this to the attention

of the jury by commenting, under the "missing witness" instruction by the Court, on the Government's failure to produce Tyler. To deprive him of this privilege was to deprive him of a substantial right. United States v. Jackson, supra, 44.

According to Wigmore 2/:

"***to prohibit the inference entirely is to reduce to an arbitrary rule of uniformity that which really depends on the varying significance of facts which cannot be measured.*** It is manifest, therefore, that in passing upon this question of equal availability, the trial judge is called upon to take into account all of the attendant facts and circumstances bearing upon the situation of the witness with relation to the parties, respectively."

This logical view would require the trial judge to pass also upon the equal unavailability of the witness by taking into account all the attendant facts and circumstances. In this case, according to the Statement of Proceedings, the trial judge took into account only the fact that the Government issued a subpoena for Tyler, which was all the evidence regarding the matter.

It was obvious that a subpoena issued on Thursday for a trial on the following Monday for a Maryland witness who was a natural part of the Government's case and an essential part of the defendant's case was not sufficient evidence of the effort required to discharge the Government's obligation to produce that witness. The trial judge thereupon ordered forthwith subpoena on the second day of trial.

2/ 1 Wigmore, Evidence, sec. 288 (3d.Ed. 1940, Supp. 1957)

The Government did not produce the deputy marshal to tell what had been done to locate and serve Tyler. The Government did not show what effort it had made to interview Tyler, although the prosecutor had interviewed the two minors on the Wednesday before trial. According to the Statement of Proceedings, the prosecutor argued that Tyler's absence had been sufficiently explained. The trial judge should have required more of the Government before concluding that Tyler had not been peculiarly available to it.

The trial judge, in ordering the forthwith subpoena, showed that he recognized the importance of Tyler's testimony to appellant's case. It was his sole defense and his inability to comment on the absence affected his substantial rights. Hence, the denial of the request for the "missing witness" instruction was prejudicial and is ground for reversal. Bollenbach v. United States, 326 U.S. 607, 66 S.Ct. 402, 90 L.Ed. 350.

CONCLUSION

Because the District Court erred in denying appellant request for the "missing witness" instruction, its judgment should be reversed.

Respectfully submitted,

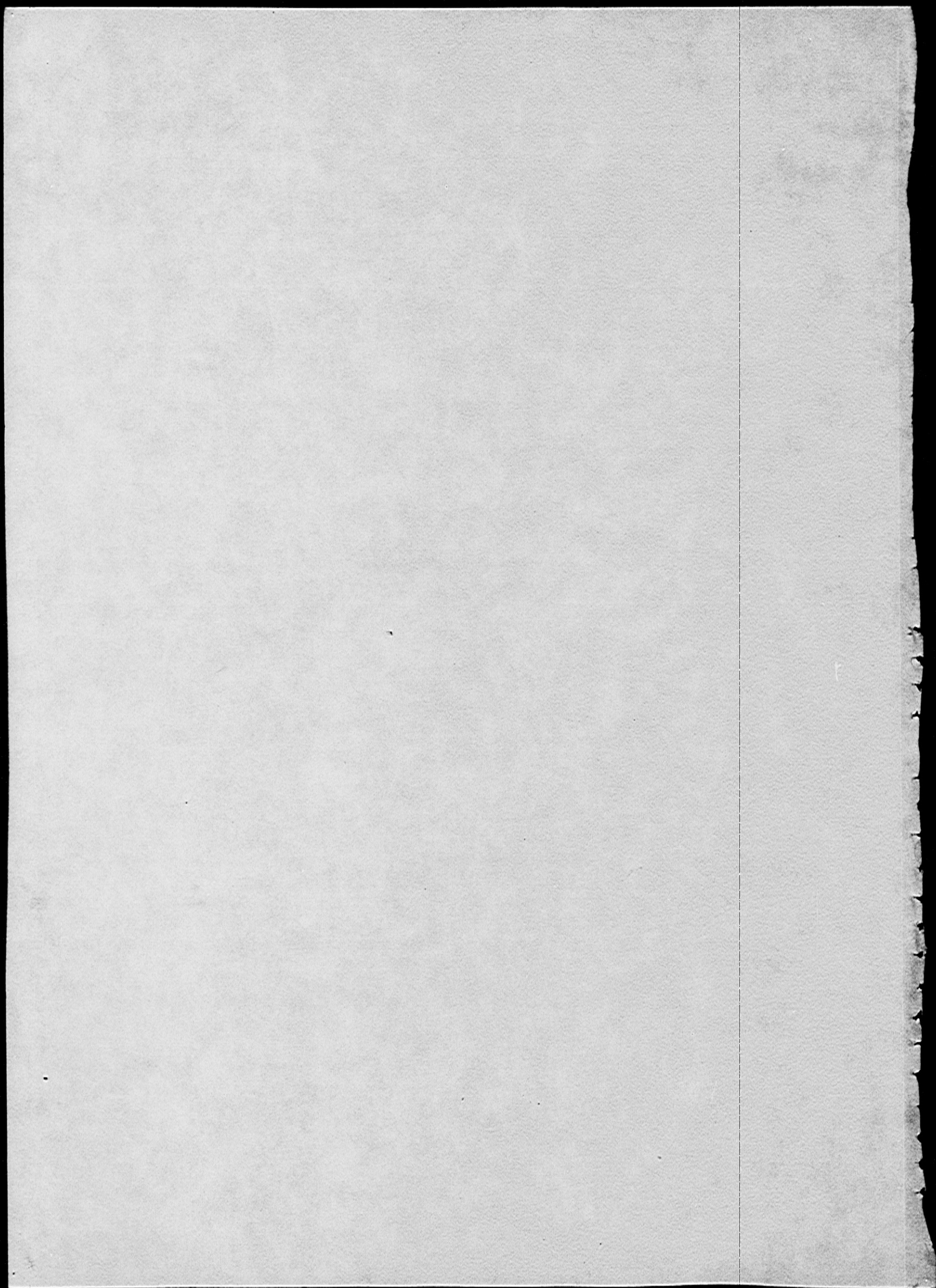
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ACKNOWLEDGEMENT OF SERVICE

Service of a copy of the foregoing brief of
appellant is acknowledged this 3rd day of September, 1968.

Assistant United States Attorney



BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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for the District of Columbia Circuit

No. 21,004 FILED OCT 7 1968

Nathan J. Paulson
CLERK

EUGENE WILLIAMS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of Columbia

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Cr. No. 1105-66

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* Cases chiefly relied upon are marked by asterisks.

ISSUE PRESENTED

Whether a missing witness instruction is appropriate where a putative "missing" witness is, in terms of producibility, equally available to both parties?

This case has not previously been before this Court under any other name or title.



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UNITED STATES OF AMERICA, APPELLEE

**Appeal from the United States District Court
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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

a) Summary of Proceedings

In a two-count indictment filed September 19, 1966, Eugene Williams was charged with the unauthorized use of and the interstate transportation of a car stolen in the District of Columbia on July 21, 1966, from John A. Hogue, in violation of 22 D.C. Code 2204 and 18 U.S.C. 2312, respectively. Appellant was arrested on July 21, 1966 while using that car in the State of Maryland. On April 3, 1967 trial commenced before Judge Robinson in the United States District Court, and on April 4, the

trial concluded with verdicts of guilty on both counts. This appeal was noted on May 1, 1967.

b) The Trial

John A. Hogue was the first witness for the Government. He testified that on July 21, 1966 he owned a Chevrolet automobile bearing Virginia tags 41410 (Tr. 4), and that at about 5:30 p.m. on the day in question he had parked this car at New York Avenue and H Street, N.W., Washington, D.C., and walked away leaving the keys in the ignition (Tr. 5). On his return at about 9:20 p.m. the car was gone (Tr. 6); he had not given anyone permission to take it (Tr. 7). He did not see that car again until the following day (Tr. 9).

Lloyd Hall, age sixteen (Tr. 18), who had known Eugene Williams for five years (Tr. 10), followed Mr. Hogue to the stand. He testified that on July 21, 1966 he had seen appellant at a ball game in Beaver Heights, Maryland (Tr. 10). Lloyd was there with a friend, Lamont Gorham, who had asked Williams to take him home (Tr. 11). Hall testified that he and Lamont then got in a Chevrolet with Virginia tags, which Williams identified as his car (Tr. 11), and drove off with Williams at the wheel (Tr. 12). They were driving on the Baltimore-Washington Parkway when appellant stopped the car and asked someone known as Peyton Tyler if he wanted a ride; at this point the radiator in the car overheated (Tr. 12). Hall had known Tyler, who was walking along the roadway, for about five years (Tr. 15). Tyler attended to the radiator, but said that he did not want a ride (Tr. 12). Williams then drove on, stopping the car a little later when it overheated again. At that point the Park Police arrived on the scene (Tr. 13).

Thirteen year old Lamont Gorham (Tr. 20), who said that he had known Eugene Williams for as long as he could remember (Tr. 22), was the next to testify. He also said that he had seen appellant at the ball field in Maryland and that, as far as he knew, Williams was alone (Tr. 22-23, 29). When Lamont left the ball park, in com-

pany with Lloyd, he went with appellant and got into a parked Chevrolet which appellant then drove onto the Parkway (Tr. 23-25). It was not yet dark when they left the playing area (Tr. 25).

While driving on the parkway they saw Tyler walking towards Washington (Tr. 26). It was the first time that day that Lamont had seen Tyler (Tr. 28). Williams stopped the car and asked if he wanted a ride; the response was in the negative (Tr. 26). At this time the car began to smoke and Tyler put water in the radiator, cautioning Williams to rest the car for a while. Tyler then resumed walking (Tr. 26). Williams started the car up but had to stop when it overheated again, and while he was parked the police arrived (Tr. 26).

John S. Crockett, Jr. of the United States Park Police followed Lamont Gorham to the stand. He said that at approximately 8:30 p.m. on July 21, 1966 he was patrolling the Baltimore-Washington Parkway, in Maryland, when he saw a Chevrolet stopped along the center strip of the road (Tr. 34, 85). The car had Virginia registration tags 41410 (Tr. 35). When Crockett pulled over to lend assistance he saw Williams behind the wheel, and Lamont Gorham and Lloyd Hall in the car (Tr. 35). When appellant was asked to produce his driver's license and registration he could not do so (Tr. 36). Williams told Crockett that the owner of the car was walking up ahead (Tr. 36).

A man was located walking down the parkway; his name was Peyton Tyler, and appellant identified him as the person to whom he was referring (Tr. 36). Crockett said that he had seen Tyler earlier in the day, some six miles from where the Chevrolet was stopped, walking on the parkway (Tr. 37). On cross-examination the officer testified that Williams had told him that Tyler was the operator of the car (Tr. 39). Crockett also said that he had no idea where Tyler presently was (Tr. 38). At the conclusion of Officer Crockett's testimony the Government rested.

The first witness for the defense was Iona Johnson who testified that on July 21, 1966 she was appellant's fiance (Tr. 43), and that at about noon he had come to see her and her baby at her mother's house, where he stayed about a half an hour before catching a cab and leaving with his dog (Tr. 44). Mr. Luther Gordon, uncle of the appellant (Tr. 46), then recited that on the day in question Williams arrived, with his dog, at Gordon's place on Hayes Street, N.E., between one and two in the afternoon, and that he stayed there until between 5:30 and 6:00 p.m. when he left to go down the block to his "daddy's" place (Tr. 46). Appellant Williams was the next witness.

Williams said that on July 21, 1966, after visiting with his fiance, he went to his uncle's house (Tr. 49) where he remained until about 5:30 p.m. when he took his dog to his place (Tr. 50). After leaving off the dog he went to the high school, arriving there at about twenty after six (Tr. 51). He remained there about thirty minutes and then walked to Maryland looking for his mother—whom he did not find (Tr. 52). He then ran across Lloyd Hall and Lamont Gorham (Tr. 53) at the intersection of Dividion Avenue and Sheriff Road (Tr. 63). He joined them and together they walked to a baseball game (Tr. 54). Along the way Williams stopped to talk with a friend, Ralph Johnson (Tr. 54). It was then that Peyton Tyler, with whom he had been acquainted for some three years, drove down the street in a Chevrolet and pulled up alongside them (Tr. 55). Appellant and the two boys, Lloyd and Lamont, then got into the car which Tyler drove out onto the Baltimore-Washington Parkway in a direction away from the ball park (Tr. 56).

Williams objected to the direction in which Tyler was driving and got him to turn back towards Washington (Tr. 57). While driving back the car overheated. Williams testified that he then left the car and raised the hood to check the engine (Tr. 57). At this point Tyler got out of the car (Tr. 58) and announced that he was going to walk home (Tr. 73). Williams said he then got in the car and began to drive. He drove up beside Tyler

and told him to get in; Tyler did and drove the car a short ways before parking it and walking away once more (Tr. 58). Williams then drove the car over to the right side of the roadway (Tr. 75). It was just then that Officer Crockett came along (Tr. 59). Williams said that he told the officer that Tyler was the owner of the car (Tr. 60).

Appellant sought to explain the difference between his version of the facts and those testified to by Lloyd Hall and Lamont Gorham by suggesting that they liked Tyler more than they liked him, and that they resented his own efforts to "rehabilitate" them (Tr. 80-83). He also said that Ralph Johnson could not be present for the trial because he was presently in a mental hospital (Tr. 69).

Following redirect examination of Officer Crockett (Tr. 84) and of Lloyd Hall (Tr. 88), examination of witnesses concluded. On his redirect Lloyd said that he had not seen Tyler at the ball game (Tr. 88), but that he had seen Tyler only the Friday before the trial (Tr. 91). After an in chambers conference at which the trial court refused a defense request for a missing witness instruction relating to the prosecution's failure to produce Peyton Tyler at the trial (summary of proceedings), closing argument commenced. In his argument defense counsel offered the explanation that Tyler had stolen the car and that the boys implicated Williams because they were covering up for Tyler (Tr. Vol. II, 12-24).

ARGUMENT

Appellant was not entitled to a "missing witness" instruction since the alleged "missing" witness was not a person peculiarly within the capability of the Government to produce.

The "missing witness" rule in this jurisdiction is that " * * * a party's failure to utilize a witness 'peculiarly within its power to produce . . . whose testimony would elucidate the transaction' permits an inference that the testimony would have been unfavorable. But we have

carefully restricted application of this rule to situations where it is 'peculiarly within' the party's 'power to produce' the witness and where, as well, the witness' testimony 'would elucidate the transaction'. And we have outlawed both comment and instruction as to absent witnesses where either of these conditions was lacking." *Wynn v. United States*, — U.S. App. D.C. — (No. 20,723, decided November 16, 1967, pp. 6-7).

In *Wynn* the defendant had testified that he had been sharing quarters with a Mrs. Gaither at the times during which the charged burglary took place. Mrs. Gaither was not called to testify, and the prosecution commented on this failure in closing argument. The court held that this comment was improper because there was no showing that Mrs. Gaither was within the peculiar capability of *Wynn* to produce. The court said that among the circumstances to be considered in determining the presence of that element are the extent of the knowledge, of the party against whom the argument is sought to be used, of the whereabouts of the witness at the time of trial; that witness' then physical amenability to subpoena; and the opportunity, of the party wishing to use the argument, to itself call the witness after learning, either before or during the trial, of his identity.

The court similarly rejected the use of the instruction for lack of this element in *Richards v. United States*.¹ There Richards claimed that a trunk full of marijuana, found in his closet, had been placed there by one Miller. Miller was a paid informer of the police whose affidavit was one of the grounds for the issuance of the search warrant which led to the recovery of the trunk. The prosecution did not call Miller as a witness. In turning down the argument that Miller was peculiarly within the power of the Government to produce, the court said, "He was well known to Richards, and was equally available to him. * * * The cases cited by appellant do not impel us to hold that a paid informer, occasionally employed by the police,

¹ 107 U.S. App. D.C. 197, 275 F.2d 655 (1960).

is an employee of the government or that he is to be held 'peculiarly within' its power to produce or peculiarly under its influence when, as here, his identity and his whereabouts were known to the appellant."²

Appellant's own testimony as well as that of the two boys, Lloyd Hall and Lamont Gorham, makes it abundantly clear that Tyler, the "missing" witness, was a person mutually well known to all three and one who could have been located and subpoenaed by appellant during the nine months he had to prepare his case. It is also clear that Tyler, who was unsuccessfully subpoenaed by the Government, was not a witness whose testimony would have added anything to the prosecution's case; but rather his testimony would merely have been cumulative. According to the witnesses who were passengers in the stolen Chevrolet, Tyler's only contact with the car was to refuse appellant's offer of a ride in it.

In light of all the circumstances known to the trial judge it cannot be said that he abused his discretion by refusing to permit the jury to draw an adverse inference from the mere fact that Tyler was not present to be examined. See *Morrison v. United States*, 124 U.S. App. D.C. 300, 365 F.2d 521 (1966).

² 107 U.S. App. D.C. at 200, 275 F.2d at 658.

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

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